HIGH COURT OF UTTARANCHAL AT NAINITAL.

CM First Appeal No. 1081 of 2001

Satya Narayan S/O Shri C.M. Nautiyal, R/O Bhupatwala
Near Shantikunj, Haridwar.

… Plaintiff-Appellant.

Versus

Smt. Krishna Nautiyal, W/O Satya Narayan Nautiyal,
D/O Shri T.R. Bahuguna, R/o Sawali Patti, Bamund,
District Tehri,

… Defendant-Respondent.

Sri Paresh Tripathi, learned counsel for the appellant.
Sri M.S.Tyagi, learned counsel for the respondent.

Date May 19, 2006.

Hon. B.S. Verma, J.

This appeal under Section 47 of the Guardians and Wards Act, 1890 (***for short the Act***) is directed against the order dated 25-7-2001, passed by the District Judge Haridwar in Misc. Case No. 27 of 1999, Satya Narayan Nautiyal Vs. Smt. Krishna Nautiyal, whereby the learned District Judge dismissed the application under Sections 10 to 25 of the said Act moved by the father.

The grounds taken by the appeal are that the mother of the child is unable to maintain herself and she has claimed maintenance from the husband-appellant, therefore, the welfare of the child which is the main factor to be considered under the said Act is likely to be affected adversely, therefore, the order of the District Judge is not tenable in the eye of law; that the District Judge has dismissed the entire case without framing points for consideration/issues and that the finding of the District Judge holding that the mother can better look-after the welfare of the child is entirely against the material on record.

Relevant facts of the case are that the appellant Satyanarain Nautiyal filed a petition under Sections 10 and 25 of the act for appointment of guardian of the person and property and for custody of his own minor son Gaurav, who has been living with his wife. It was alleged that the minor son is the only child born out of the their wedlock and he has much affection and love for the child. The appellant-petitioner also alleged that the mother of the child who has been living separately has no income of her own and the minor son is not being properly maintained by his mother. According to the applicant-appellant, brother of the wife submitted an application before the Nari Kalyan Kendra Jwalapur (Hardwar) alleging that the applicant had been committed cruelty of to his wife. On enquiry, it was found that the allegations against the appellant were false. However, the custody of minor son was given to the O.P. temporarily and she was advised to go to her parents house and it was agreed that the minor son will be handed over to the custody of the applicant after a week, but the opposite party did not turn up not the minor son was given his custody. According to the appellant, the minor son is not being properly looked after by the mother, hence the petition under Section 10 and 25 of the said Act was filed. The application was supported by an affidavit.

The petition was resisted by the wife who filed objection asserting that the welfare and interest of the child is not secured with the father. It was pleaded that the petition has been made on false grounds. It was stated that the wife was compelled to leave the place of her in-laws due to cruelty and mis-behaviour of the husband and her in-laws, therefore, she was compelled to file an application under Section 125 Cr.P.C. before the Magistrate. It was also stated that the son is infant and his welfare is secured in the custody of mother and not the father.

At the outset it may be mentioned that in the present case at hand, the petition under the Act was hotly contested before the learned District Judge.

In the course of argument, the learned counsel for the appellant has urged that no opportunity of leading oral evidence was afforded to the appellant by the District Judge. It was vehemently argued that in the persent case, since the petition was contested by the husband on the one side and the wife on the other, the court below ought to have fixed a date for leading evidence as provided by Section 13 of the Act, therefore, for want of adequate opportunity for leading evidence, legal right of the appellant was taken away. On the other hand, learned counsel for the respondent submitted that the District Judge has rightly dismissed the petition after perusing the affidavits filed by the parties to the proceedings.

I have heard learned counsel for both the parties and have gone through the entire material on record.

In the present case, the petition was filed by the father of the minor Gaurav and the proceedings were contested by his wife, who is mother of the minor son. Section 13 of the Act reads as under:-

"Hearing of evidence before making of order*- On the day fixed for the hearing of the application, or as soon afterwards as may be, the Court shall hear such evidence as may be adduced in support of, or in oppositition to, the application."*

From a bare perusal of the entire order-sheet of the lower court record, it appears that right from the beginning the date of disposal of the case was fixed. In my view, when a petition is hotly contested, the proper course open to the trial court was to fix a date for hearing and the parties ought to have been given full opportunity to lead their evidence oral as well as documentary, if they so desired, the thereafter the petition should have been decided. Though it cannot be said that no opportunity was available to the appellant, but in view of the provisions of Section

13 of the Act and taking into consideration the facts and circumstances of the case, for a just decision of the petition, the parties to the proceedings must be given an opportunity to lead evidence either in support or in opposition to the application.

In the facts and circumstances of the case, it is a fit case for remand. The impugned order dated 25-7-2001 is set aside. The case is remanded to the District Judge Hardwar, who shall fix a date of hearing and shall afford opportunity of adducing evidence, oral as well as documentary, to both the parties.

The appeal is accordingly allowed. The impugned order is set aside. The District Judge Hardwar is directed to decide the case afresh and affording opportunity to both the parties to lead evidence, if any, and then to proceed to hear the case on merits in the light of the observations made above and according to law. It is open to the District Judge to consider the material already on record along with the additional evidence to be led by the parties.

The District Judge shall decide the proceedings expeditiously within a period of six months as far as possible from the date of production of certified copy of this order. Both the parties shall co-operate in the expeditiously decision of the case. No order as to costs.

(B.S.Verma, J.)

RCP